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SAMAT YAMIN v. PP

FEDERAL COURT, PUTRAJAYA
VERNON ONG LAM KIAT FCJ
ZABARIAH MOHD YUSOF FCJ
RHODZARIAH BUJANG FCJ
B [CRIMINAL APPLICATION NO: 07-8-06-2022 (B)]
5 OCTOBER 2022

Abstract – *Article 149 of the Federal Constitution allows a legislation to be promulgated, even if such legislation is inconsistent with the provisions on fundamental liberties under arts. 5 or 9, 10 and 13, provided that the said legislation cites either one of the six matters enumerated in art. 149(1)(a) until (f) in its recital. Further, a discriminatory law is valid if it is based on a reasonable or permissible classification, which is based on an intelligible differentia that has nexus to the objective of the law itself.*

CONSTITUTIONAL LAW: *Federal Constitution – Fundamental liberties – Legislation inconsistent with provisions on fundamental liberties provided in Federal Constitution – Applicant charged under ss. 26A and 26D of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Applicant detained in prison pending trial, by virtue of s. 13(1) of Security Offences (Special Measures) Act 2012 ('SOSMA') – Whether ss. 26A and 26D of Act come within ambit of SOSMA – Whether s. 13 of SOSMA contrary to arts. 5, 8 and 121 of Federal Constitution – Whether constitutional*

CRIMINAL PROCEDURE: *Bail – Application for – Application for bail pending trial – Applicant charged under ss. 26A and 26D of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Applicant detained in prison pending trial, by virtue of s. 13(1) of Security Offences (Special Measures) Act 2012 – Whether application abuse of court process – Rules of the Federal Court 1995, rr. 102(4), 106 & 137*

The applicant was charged under ss. 26A and 26D of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('Act'), which offences were listed in Part IIIA of the Act and, by reason of the same, the First Schedule of the Security Offences (Special Measures) Act 2012 ('SOSMA') applied. Therefore, by virtue of s. 13(1) of the SOSMA, the applicant was detained in prison pending his trial at the High Court. Aggrieved by the incarceration, the applicant applied for bail pending his trial but the High Court dismissed the application. The same application, filed at the Court of Appeal, also bore no success. Hence, the present application. In support of his application, the applicant submitted that: (i) ss. 26A and 26D of the Act did not come within the ambit of the SOSMA; (ii) s. 13 of the SOSMA was

unconstitutional for, *inter alia*, being contrary to arts. 5, 8 and 121 of the Federal Constitution ('FC'); (iii) he was a first offender with no risk of absconding; (iv) he was suffering from medical illnesses; and (v) he was the sole breadwinner of the family. The respondent raised preliminary objections that, *inter alia*, (i) the applicant's application was an abuse of process; and (ii) Rules 102(4), 106 and 137 of the Rules of the Federal Court 1995 ('RFC'), which were cited by the applicant in his notice of motion for bail, were not applicable.

Held (dismissing application)
Per Rhodzariah Bujang FCJ delivering the judgment of the court:

(1) The court failed to see in what way the court's process was abused by the applicant, who merely wanted to have his freedom whilst awaiting his trial. As for the non-applicability of the RFC, of course, r. 102(4) was definitely so because it concerned the court's power to vary or discharge an order made by a single judge of the Federal Court since 'judge' is defined under r. 2 as such and there was definitely no such order before the court. However, both rr. 106 and 137 of the RFC have bestowed upon the court the power to hear this application. Based on the word 'application' (in rr. 106 and 137 of the RFC), the court's power extended to any application made before it and the applicant's notice of motion was definitely covered by the RFC. (paras 2 & 3)

(2) The court did not ignore but instead, had first and foremost at the forefront of its mind, the equality provisions in art. 8(1) and (2) of the FC which, *inter alia*, did not permit gender discrimination in law, and the glaring provisions in s. 13(2) of the SOSMA which, at plain sight, appeared to be so. Then again, what must be made clear was the proviso embedded in the opening words of art. 8(2) of the FC, namely 'Except as expressly authorised by this Constitution …'. That authorisation is, in the context of this application, art. 149 of the FC which allows a legislation to be promulgated even though it is inconsistent with the provisions on fundamental liberties under arts. 5 or 9, 10 and 13, provided the said legislation cites either one of the six matters enumerated in art. 149(1)(a) until (f) in its recital. That pertinent provision is sub-cl. (a). That very provision is cited, including all the other sub-clauses, except sub-cls. (c) and (e) in the preamble of the SOSMA. (para 15)

(3) A female accused of jumping bail is not as common an occurrence as that of a male accused. The discrimination based on gender here was both reasonable and permissible as it satisfied the two conditions laid down in *Datuk Hj Harun Hj Idris v. PP*, namely that (i) it was founded on an intelligible differentia; and (ii) there was a rational nexus between the object of the SOSMA, which was clearly enacted for the prevention of

A acts prejudicial to public order and security of our nation or any part of it and the denial of bail to a person charged for any offence covered by it. (para 19)

(4) As for the other leeway given to those below the age of 16 years, it is plain that there is a special law governing juveniles accused for crimes, B which is the Child Act 2001 and, before that, its predecessor, the Juvenile Courts Act 1947. Furthermore, it was for the court to determine, based on the degree of the illness of the accused person and the infirmity he suffered, backed by a conclusive medical evidence, that it would be just and fair for the person so charged to be freed on bail C whilst awaiting the conclusion and decision of the court on the charge so preferred against him. In the present case, the medical report exhibited to the applicant's affidavit in support was in respect of his condition on 8 August 2018 and not his current one when the application was made *ie*, 3 June 2022. The applicant had also been under D treatment from the clinic with prescribed medications and the prison authority had given an undertaking to attend to his medical requirements. If his medical conditions and the situation so warranted, there was no prohibition for the applicant to make a fresh application to be so released. (para 21)

E ***Bahasa Melayu*** *Headnotes*

Pemohon dituduh bawah ss. 26A dan 26D Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('Akta'), yang kesalahan-kesalahannya tersenarai bawah Bahagian IIIA Akta dan, atas sebab itu, Jadual Pertama Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('SOSMA') F terpakai. Lanjutan itu, berasaskan s. 13(1) SOSMA, pemohon ditahan di penjara sementara menunggu perbicaraannya di Mahkamah Tinggi. Terkilan dengan pemenjaraan tersebut, pemohon memohon jaminan sementara menunggu perbicaraan tetapi Mahkamah Tinggi menolak permohonannya. Permohonan sama, yang difailkan di Mahkamah Rayuan, juga tidak G membuahkan kejayaan. Maka timbul permohonan ini. Menyokong permohonannya, pemohon menghujahkan bahawa: (i) ss. 26A dan 26D Akta tidak terangkum dalam ruang lingkup SOSMA; (ii) s. 13 SOSMA tidak berperlembagaan kerana, antara lain, bercanggah dengan per. 5, 8 dan 121 Perlembagaan Persekutuan ('PP'); (iii) dia adalah pesalah pertama tanpa H apa-apa risiko melarikan diri; (iv) dia menghidap beberapa penyakit; dan (v) dia adalah pencari nafkah utama keluarganya. Responden membangkitkan bantahan awalan bahawa, antara lain, (i) permohonan perayu adalah satu salah guna proses; dan (ii) Kaedah 102(4), 106 dan 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KKMP'), yang dipetik oleh pemohon dalam I notis usulnya untuk jaminan, tidak terpakai.

Diputuskan (menolak permohonan)
Oleh Rhodzariah Bujang HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah gagal melihat dalam keadaan apakah proses mahkamah disalah guna oleh pemohon, yang sekadar menginginkan kebebasan sementara menunggu perbicaraan. Bersangkutan ketakterpakaian KKMP, k. 102(4) sudah tentu sedemikian kerana adalah berkenaan kuasa mahkamah mengubah atau melepaskan satu perintah yang dibuat oleh seorang Hakim Mahkamah Persekutuan kerana 'hakim' ditafsir bawah k. 2 sedemikian dan tiada perintah sebegitu di mahkamah ini. Walau bagaimanapun, kk. 106 dan 137 KKMP memberi kuasa pada mahkamah untuk mendengar permohonan ini. Berdasarkan perkataan 'permohonan' (dalam kk. 106 dan 137 KKMP), kuasa mahkamah meliputi mana-mana permohonan yang dibuat padanya dan notis usul pemohon diliputi oleh KKMP.

(2) Mahkamah tidak mengabaikan bahkan, dalam mindanya, memberi keutamaan pada peruntukan-peruntukan kesamarataan dalam per. 8(1) dan (2) PP yang, antara lain, tidak membenarkan diskriminasi jantina bawah undang-undang, dan peruntukan nyata dalam s. 13(2) SOSMA yang, sekilas pandang, kelihatan sebegitu. Walau bagaimanapun, yang perlu ditegaskan adalah proviso yang termaktub dalam perkataan-perkataan pembuka per. 8(2) PP, khususnya 'Kecuali sebagaimana yang dibenarkan dengan nyata oleh Perlembagaan ini ... '. Kebenaran tersebut adalah, dalam konteks permohonan ini, per. 149 PP yang membenarkan agar satu-satu undang-undang diisytiharkan walaupun undang-undang tersebut tidak selari dengan peruntukan-peruntukan hak asasi bawah per. 5 atau 9, 10 dan 13, selagi undang-undang tersebut menyatakan salah satu daripada enam hal perkara yang termaktub dalam per. 149(1)(a) hingga (f) dalam sebutannya. Peruntukan yang relevan adalah sub-kl. (a). Peruntukan itu disebut, termasuk lain-lain sub-klausa, kecuali sub-kl. (c) dan (e) dalam mukadimah SOSMA.

(3) Seorang tertuduh wanita yang melarikan diri bukan satu kelaziman berbanding seorang tertuduh lelaki. Diskriminasi berdasarkan jantina dalam kes ini adalah munasabah dan dibenarkan kerana memenuhi dua syarat yang digariskan dalam *Datuk Hj Harun Hj Idris v. PP*, khususnya bahawa (i) berasaskan *differentia* yang boleh difahami; dan (ii) terdapat pertalian rasional antara objektif SOSMA, yang jelas digubal untuk menghalang tindakan-tindakan yang boleh memudaratkan ketenteraman dan keselamatan awam negara atau mana-mana bahagiannya dan penafian jaminan buat seseorang yang dituduh atas kesalahan yang diliputinya.

(4) Berkenaan peluang yang diberi kepada mereka yang berumur bawah 16 tahun, jelas bahawa terdapat undang-undang khas yang mengawal selia juvana yang dituduh dengan jenayah, iaitu Akta Kanak-kanak 2001 dan,

sebelum itu, Akta Mahkamah Juvana 1947. Tambahan lagi, adalah untuk mahkamah memutuskan, berdasarkan tahap penyakit tertuduh dan ketidakupayaan yang dialaminya, dengan sokongan keterangan perubatan yang konklusif, bahawa adalah adil dan saksama agar seorang tertuduh dibebaskan dengan jaminan sementara menunggu kesimpulan dan keputusan mahkamah tentang pertuduhan terhadap dirinya. Dalam kes ini, laporan perubatan yang dilampirkan dalam afidavit sokongan pemohon adalah berkaitan keadaannya pada 8 Ogos 2018 dan bukan keadaan semasa iaitu semasa permohonan dibuat pada 3 Jun 2022. Pemohon juga sedang menerima rawatan klinik dengan ubat-ubatan yang dipreskripsi dan pihak berkuasa penjara juga telah berjanji untuk memberi perhatian pada keperluan-keperluan perubatannya. Jika keadaan kesihatan dan situasi mengizinkan, tiada larangan untuk pemohon membuat permohonan baharu agar dilepaskan.

Case(s) referred to:

Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Collector and District Magistrate & Ors v. S Sultan AIR [2008] SC 2096 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***
Entiran Durasamy & Other Applications v. PP [2021] 10 CLJ 902 HC ***(refd)***
Johnson Tan Han Seng v. PP And Other Appeals [1977] 1 LNS 38 FC ***(refd)***
Koh Chin Wah v. PP (Criminal Application No: W-07-94-08-2019) (Unreported) ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***
Malaysian Bar & Anor v. Government Of Malaysia [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 SC ***(refd)***
Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***
Mohamad Roslan Marjo v. PP & Other Applications [2019] 4 CLJ 648 HC ***(refd)***
PP v. Azmi Sharom [2015] 8 CLJ 921 FC ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
PP v. Khairuddin Abu Hassan & Anor [2017] 4 CLJ 701 CA ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 1 LNS 100 FC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
Ravindran Anemalai v. PP [2022] 1 LNS 125 HC ***(refd)***
Re Application Of Tan Boon Liat; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC ***(refd)***
Re Application Tan Boon Liat & Ors [1977] 1 LNS 107 FC ***(refd)***
Sathiaseelan Sinnaya v. PP & Other Cases [2022] 1 LNS 209 HC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Suresh Kumar Velayuthan v. PP [2020] 4 CLJ 270 HC ***(refd)***

Legislation referred to:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 13, 26A, 26D
Courts of Judicature Act 1964, s. 87
Criminal Procedure Code, s. 388(1)
Federal Constitution, arts. 5, 8(1), (2), 9, 10, 13, 121, 149(1)(a), (b), (c), (e), (f)
Legal Profession Act 1976, s. 46A(1)(a)
Limited Acquisition Act 1960, s. 400
Penal Code, s. 124L
Rules of the Court of Appeal 1994, rr. 68, 72(4), 76
Rules of the Federal Court 1995, rr. 2, 102(4), 106, 137
Security Offences (Special Measures) Act 2012, s. 13(1), (2)(b)

For the applicant - Ramkarpal Singh, Sangeet Kaur Deo, Harshaan Zamani & Simranjit Kaur; M/s Karpal Singh & Co
For the respondent - Mohd Dusuki Mokhtar & Nahra Dollah; DPPs

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang FCJ:

[1] The applicant in this matter before us was charged, following his arrest on 16 June 2020, under both ss. 26A and 26D of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("the Act"), which offences are listed in Part IIIA of the Act and by reason of the same, the First Schedule of the Security Offences (Special Measures) Act 2012 (SOSMA) applies. Therefore, consequent thereof and by virtue of s. 13(1) of the SOSMA, he was detained in prison pending his trial. Aggrieved by that incarceration, the applicant, through his previous solicitor, filed an application for bail pending his trial in the High Court of Klang but the application was dismissed by the learned High Court Judge. The same application was filed by his present solicitor in the Court of Appeal (COA), which was similarly dismissed as it upheld the preliminary objection of the respondents. Given that as an almost identical objection was raised before us, the details of it will be elucidated further and subsequently in this judgment, which is in respect of the same application for bail by the applicant. That application was heard by us on the 5 October 2022 and our decision to dismiss it was delivered at the conclusion of the said proceeding. Our reasons for doing so are as follows, but as indicated just now we would first deal with the said preliminary objection taken by respondents.

The Preliminary Objection

[2] The said objection was grounded on three contentions of the respondents, to wit, that the applicant's application was incompetent as there was no appeal filed against its dismissal by the lower courts, that rr. 102(4), 106 and 137 of the Rules of the Federal Court 1995 ("FC Rules") cited by

A the applicant in his notice of motion for bail are not applicable and that it was an abuse of the court's process. In the COA, the same incompetency and jurisdictional issues, though framed under the relevant Rules of the Court of Appeal 1994, that is, rr. 68, 72(4) and 76 were raised, but not the last ground on abuse of process. These grounds we gathered from the documents e-filed
B in the court's management system, as they were not highlighted by the parties in their written submissions before us. In this regard, it is salutary to note that it was held in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321 that a court of first instance's grant of bail or refusal to do so is not a final decision that determines the right of the appellant in the outcome
C of his trial and therefore that decision is not appealable. That is also a view we subscribed to and we are fortified by the fact that this same court in *Koh Chin Wah v. PP* (Criminal Application No: W-07-94-08-2019) did hear a similar bail application by the applicant in the said case who was also charged under s. 26A of the Act. Although that application of *Koh Chin Wah* was allowed by this court, the reasons for doing so are not known because
D there were no grounds of judgment delivered. However, the obvious and undeniable inference is that by hearing his application, this court had a '*fortiori*' considered itself competent and has the jurisdiction to hear the same. There is no good or cogent reason for us to depart from that stand for the respondent's preliminary objection in the said case was also dismissed. We
E also failed to see in what way the court's process was abused by the applicant here who merely wanted to have his freedom whilst awaiting his trial and when we considered the fact that his application was filed on 3 June 2022, whereas *Koh Chin Wah*'s case (*supra*) was decided on 22 December 2020, the applicant, therefore, had every reason to believe that this application of his
F is a proper legal recourse to end his incarceration pending his trial, thus abusing the court's process he did not.

[3] As for the non-applicability of the said FC Rules, of course, r. 102(4) is definitely so because it concerns this court's power to vary or discharge an order made by a single judge of the Federal Court since judge is defined
G under r. 2 as such and there is definitely no such an order before us here. However, both r. 106 and r. 137 have bestowed upon this court the power to hear this application given the express words used in them and which for clarity, we would reproduce below:

H Rule 106 of the RFC provides:

Ancillary powers of the Court

I The Court shall exercise, for all purposes incidental to or arising from **any application** or appeal, all the powers which, under the provisions of any written law in force in the place of trial instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

> Rule 137. Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any **application** or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.
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> (emphasis added)

Obviously, from the word 'application' as emphasised above, this court's power as described above extends to any application made before it and the applicant's notice of motion is definitely covered by the said Rules. With respect to the learned Senior Federal Counsel ("SFC"), there is nothing in r. 106 which indicates that this court's power in confined only to criminal appeals. As for his contention that r. 137 is a subsidiary legislation which should not override s. 87 or the Courts of Judicature Act 1964, which is this court's power to hear and determine criminal appeals, the simple answer to that has been given earlier, that is, the granting and refusal of bail by the High Court is not appealable and as held in *Dato' Seri Anwar bin Ibrahim*'s case (*supra*) we have the inherent jurisdiction to prevent injustice and abuse of powers for we are not just a court of law but also a court of justice as well.

Grounds Of The Application

[4] In the applicant's affidavit in support, he deposed the following factors for justifying the granting of his application and in order of their narration in it, they are:

(i) sections 26A and 26D of the Act do not come within the ambit of SOSMA.

(ii) section 13 of the SOSMA is unconstitutional for, *inter alia*, being contrary to arts. 5, 8 and 121 of the Federal Constitution.

(iii) medical illness suffered by the applicant such as heart problem, kidney problem, high cholesterol, low blood pressure, gout and knee osteoarthritis. I paused here to note that in the next para. 19 of his affidavit in support, the applicant states that he had recently suffered from high blood pressure. These illnesses, except the knee osteoarthritis according to him, only happened during his incarceration. These illnesses, coupled with his age (56 years old) put him, deposed the applicant further, in the high category list for COVID-19 infection.

(iv) a first offender with no risk of absconding.

(v) sole breadwinner of the family (for his wife passed away during his remand) with three children aged 29, 23 and 12 years old, respectively, and a grandchild aged two years old whose father (his son in law) was remanded and charged with him.

[5] However, obvious from both the oral and written submissions of learned counsel for the applicant, the main thrust of his arguments against his client's continued incarceration rests on the constitutionality of s. 13 of the SOSMA, which therefore prompts us to deal with it first. The said provision reads as follows:

> 13. Bail
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> (1) Bail shall not be granted to a person who has been charged with a security offence.
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> (2) **Notwithstanding subsection (1):**
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> (a) a person below the age of eighteen years;
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> (b) a woman; or
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> (c) **a sick or an infirm person,**
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> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], **may be released on bail** subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code. (emphasis added)

[6] That absolute prohibition in s. 13(1), though qualified in sub-s. (2) is, according to learned counsel, in breach of the equality principle enshrined in art. 8(1) and (2) of the Federal Constitution because of two reasons, *ie*, firstly, the restriction of court's power to grant bail is discriminatory and does not satisfy the reasonable classification test. Secondly, that restriction is in breach of the doctrine of proportionality. On the first reason, learned counsel submitted it was so because only persons who fall under the categories specified in s. 13(2) would be granted bail and there is gender discrimination because a woman charged with the said offence can apply and be granted bail but for a man, only if he falls under the said specified categories in s. 13(2). Learned counsel cited this court's decision in *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] 2 MLJ 309 as authority for the proposition that in order to determine whether the said restriction is discriminatory, the court must adopt the reasonable classification test. The said cited case concerns the right of the respondent, a non-Muslim though academically qualified in Syarie Law, to be admitted to practice it as a "Peguam Syarie" and this court, in deciding by a majority that the decision of the applicant to deny her of the same was legally valid, made reference to the same point of discrimination based on the equality provision in art. 8. Paragraph 45 of the majority judgment by Raus Sharif PCA (as His Lordship then was), which is illuminating on this point is reproduced in full below.

> [45] The law on art. 8 of the Federal Constitution is settled. **A law that discriminates is good law if it is based on reasonable or permissible classification**. The governing principles of law on art 8 of the Federal

Constitution was succinctly laid down in the case of *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of *Shri Ram Khrisna Dalmia v. Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538, held **that a law that discriminates is good law if it is based on reasonable or permissible classification**. Two conditions must be satisfied, that is:

(a) the classification is founded on an intelligible differentia which distinguished persons that are group together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupation and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. (emphasis added)

[7] It has already been alluded to in *PP v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701 and it is beyond dispute that SOSMA's purpose and object is to combat terrorism and s. 13 thereof is to ensure that those charged with offences under it would not abscond or interfere with evidence and/or witnesses as rightly submitted by applicant's counsel. However, learned counsel for the applicant contended that the restriction based on gender here does not satisfy the reasonable classification test and therefore s. 13(2) have breached the principle of equality under art. 8(1) and (2). Thus, he submitted that it is unconstitutional and invalid, given that the court's judicial power to grant bail is restricted by the said s. 13(2).

[8] In respect of the applicant's second ground on this issue which is a breach of the doctrine of proportionality, learned counsel begins with a quotation from this court's decision in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1, which we would reproduce below, with the relevant excerpts highlighted:

[127] To summarise, the following principles may be discerned from the above authorities:

(a) art. 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt:

(b) the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused – art. 8(1).

(c) a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art. 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary;

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(d) the test of proportionality comprises three stages:

(i) there must be a sufficiently important objective to justify in limiting the right in question;

(ii) the measure designed must have a rational nexus with the objective; and

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(iii) the measure used which infringes the right asserted must be proportionate to the objective;

(e) factors relevant to the proportionality assessment include, but are not limited to, the following:

(i) whether the presumption relates to an essential or important

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ingredients of the offence;

(ii) opportunity for rebuttal and the standard required to disprove the presumption; and

(iii) the difficulty for the prosecution to prove the presumed fact;

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(f) a significant departure from the presumption of innocence would call for a more onerous justification. (emphasis added)

Learned counsel then posed these questions:

> The question that arises as a result is whether it is fair for Parliament to completely deprive bail to a fit and healthy man charged with a security
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> offence while granting privilege to a female charged with a security offence to apply and to be granted bail under s. 13(2)? Another pertinent question to be answered at this juncture is whether it is fair and proportionate for Parliament to restrict the Courts' judicial powers in granting bail to only categories under s. 13(2) SOSMA and not to other persons *ie*, fit and healthy male accused persons?

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which he answered in para. 53 of his written submission as follows:

> 53. It is submitted that such a deprivation of a fundamental liberty is far from fair but instead, draconian, particularly when there is no legal basis for the same. There can be no other reason to deny a male accused person
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> of his freedom if not for a complete disregard for his fundamental basic human rights and the powers of the judiciary.

[9] In response to the above submission on the constitutionality of s. 13(2), the learned Senior Federal Counsel ("SFC") first cited a number of our apex court's decisions listed below on the presumption that a law passed

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by Parliament is constitutional unless proven otherwise and the burden of proof rests on the party challenging the said law to prove it is not so. The cases are:

(i) *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566;

(ii) *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12; and

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(iii) *PP v. Azmi Sharom* [2015] 8 CLJ 921; [2015] 6 MLJ 751.

Article 8, submitted by the learned SFC further, is not absolute or universal in application to everyone in all circumstances for the guarantee of equality is only for person in the like circumstances as held by this court in *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166 which was affirmed in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 as well as in the earlier decision of this court in *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 (cited in *Majlis Agama Islam*'s case (*supra*)). In the words of Suffian LP in *Datuk Hj Harun*'s case (*supra*):

> In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Session Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. *All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.* (emphasis added)

[10] Based on the case authorities which he had cited above, the learned SFC submitted that s. 13(2) does not discriminate and violate the principle of equality guaranteed under art. 8 of the Federal Constitutional because, in his words:

> 30. A woman charged and detained under SOSMA are of unequal comparison and cannot be equated with a man that is charged and detained under SOSMA as they clearly possess different characteristics and criteria, and hence should reasonably be placed under a different classification altogether.
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> 31. A woman accused and detained under SOSMA cannot be compared to a man accused and detained under SOSMA just like a sick or an infirm person charged under SOSMA too cannot be compared with a healthy person charged under SOSMA simply because they clearly have different criteria and are in different classifications.

[11] Alternatively, submitted by the learned SFC further, even if the court finds s. 13(2) discriminatory, it is still good law because it does not violate the principle of equality under art. 8 due to the reasonable classification of persons made under the said provision based on *Datuk Hj Harun*'s case (*supra*)

which was also adopted in the *Malaysian Bar & Anor v. Government Of Malaysia* [1987] 1 CLJ 459; [1987] CLJ (Rep) 185; [1987] 2 MLJ 165 and which case, we wish to reiterate here, held that when the discrimination in the law is based on reasonable or permissible classification it is still a good and valid law. The trite law is that the said classification is determined based on two conditions, as laid out earlier from the judgment of *Datuk Hj Harun*'s case as quoted in *Majlis Agama Islam*'s case (*supra*).

[12] In the *Malaysian Bar*'s case (*supra*), the alleged discrimination was the prohibition against a lawyer of less than seven years of practice from becoming a member of the Bar Council, a member of the State Bar Committee and the committees established under them. The Supreme Court held that the said condition is permissible based on intelligible differentia and there is a rational nexus between the said condition in s. 46A(1)(a) of the Legal Profession Act 1976 and its objective, which is, that the Malaysian Bar be governed by more experienced lawyers. Therefore, the Supreme Court held that the said durational classification was a reasonable one. Based on the authority cited above and the Court of Appeal's explanation in this case now before us as to what constitutes intelligible differentia, the learned SFC submitted that s. 13(2) satisfies that element as the classification therein is based on characteristic or criteria, which is clear, understandable, acceptable and is 'intelligible'.

[13] In addition to the above authorities, the learned SFC also referred to and relied on two publications which we will make further reference to later in this judgment. Based on the above publications, the learned SFC submitted that it is justifiable and reasonable to accord the leniency on bail to women for it is almost out of the ordinary for women to abscond from trial or disrupt the investigation process.

[14] Further on this issue of constitutionality of the alleged impugned provision, the respondent's firm stand is that the impugned provision is not in violation of art. 8 of the Federal Constitution based on the proportionality test as explained by the COA in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213 which is that a Legislative or Executive response to a State of Affairs must not only be objectively fair but must be proportionate to the object sought to be achieved, otherwise that action can be struck down. The said test was applied by this court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 which concerns s. 46A(1) of the Legal Profession Act 1976. That provision disqualifies a member of Parliament from being a member of the Bar Council or a Bar Committee and this court decided that the said provision does not violate art. 8 of the Federal Constitution. The learned SFC submitted that the same is true in our case here as the threefold analysis to determine the test of proportionality as applied in *Sivarasa*'s case (*supra*) in para. 29 has been met and that paragraph reads as follows:

[29] In *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, Lord Steyn adopted what was said in *de Freitas*:

> The contours of the principle of proportionality are familiar. In *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1991] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
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> > Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

His justification for stating so is based on the then Minister in the Prime Minister's Department winding up speech on the SOSMA bill as reported in the Hansard of Dewan Rakyat dated 17 April 2012 which explains the seriousness of the offences under SOSMA, its preventive aim to combat security offences, the devastating effect of these offences and the fact that the limited right for bail was meant to cater to the worrying effect of such security offences. Thus, it is obvious, said the learned SFC, that s. 13(2) is intended to limit a person's eligibility for bail in order to ensure that a person charged under a security offence would have a smaller window and opportunity to escape, to remove or destroy available evidence or imposed threats of violence by committing criminal acts such as murder. In other words, given its preventive nature, it is, therefore, reasonable to limit the right of bail to the persons stated in the said provision. Thus, it meets the proportionality test and so art. 8 is not violated. The learned SFC in this regard also highlighted two High Court's decision on the exact same impugned provision, which are *Ravindran Anemalai v. PP* [2022] 1 LNS 125 and *Sathiaseelan Sinnaya v. PP & Other Cases* [2022] 1 LNS 209 where in both decisions, the said provision "... is held to be constitutionally valid as it is based on a classification that is both reasonable and proportionate. However, it is also to be noted, as highlighted by learned counsel for the applicant in his written submission, that the High Court in *Entiran Durasamy & Other Applications v. PP* [2021] 10 CLJ 902 had decided to the contrary, holding that the said impugned provision is not only discriminatory as devoid of any rationale or reasonable classification or differentiation but goes against the non-gender discrimination or equality provision in art. 8 of the Federal Constitution". The learned Judicial Commissioner then held that the word 'women' in s. 13(2)(b) must be defined to include 'men'.

[15] Bearing the aforesaid submissions in mind, in coming to our decision which was adverse to the applicant, we did not ignore but instead had first and foremost at the forefront of our minds the equality provisions in art. 8(1) and (2) of our Federal Constitution which, amongst others, do not permit

A gender discrimination in any law and the glaring provision in s. 13(2), which at plain sight appears to be so. Then again, what must be made clear is the proviso embedded in the opening words of art. 8(2), that is, "Except as expressly authorised by this Constitution ..." That authorisation is, in the context of this application, art. 149 which allows legislation to be
B promulgated though inconsistent with the provisions on fundamental liberties under art. 5 (or arts. 9, 10 and 13) provided the said legislation cites either one of the six matters enumerated in art. 149(1)(a) until (f) in its recital. For the purpose of our judgment, that pertinent provision is sub-cl. (a) which reads as follows:

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> 149. (1) if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

D That very provision is cited, including all the other sub-clauses, except sub-cls. (c) and (e), in the preamble of SOSMA.

[16] As for the legal principles and considerations which the court must apply in determining whether the law is unconstitutional for being discriminatory, they are well settled and the same we had reproduced earlier
E from the written submissions of both the applicant's learned counsel and the learned SFC. The bottom line is a discriminatory law is valid if it is based on a reasonable or permissible classification, which is based on an intelligible differentia that has a nexus to the objective of the law itself.

F **[17]** As cited by the learned SFC in his written submission and mentioned in passing by us earlier, there is cogent evidence from the study conducted by an august international body, no less than the United Nations, which justifies the legislative intent in our case to allow a woman charged under SOSMA to be on bail. The report prepared and published in September 2014
G by the Women, Human Rights and Gender Section of the Office of the High Commissioner for Human Rights, Rule of Law, Equality and Non-discrimination Branch, states as follows:

> Empirical evidence shows that women have a heightened vulnerability to mental and physical abuse during arrest, questioning and in prison. Many
H women detainees face inhuman and degrading treatment during arrest, interrogation and in custody including stripped naked, threats of rape, touching, "virginity testing", invasive body searches, insults and humiliations of a sexual nature or even rape. Once imprisoned, women may be subjected to several forms of violence such as rape by other inmate and guards, forced into prostitution, touched in a sexual manner during
I frisks, watched while showering or using toilets and required to wear revealing prison uniforms.

> Since the vast majority of prisoners are men, prison systems and prison regimes have historically been designed for men – from the architecture of prisons, to security procedures, to facilities for healthcare, family contact, work and training. As a consequence, a small number of prisons meet the specific needs of women prisoners. These prisons often do no provide gender-appropriate rehabilitation services including sexual and reproductive health, mental health services, substance abuse and counselling for victims of physical and sexual abuse, lack of which is often the cause of women offending in the first place.
>
> Many problems women face after release from prison are similar to that of men, however women are likely to suffer particular discrimination and stigma. For example, female spouses often provide support to husbands in prison and upon release; women on the other hand tend to be shunned by their husband and are often rejected by their families. In some countries, they may even lose their parental rights.
>
> The impact of imprisonment can be extremely severe if the prisoner is the primary carer of the children – a role that is still overwhelmingly held by mothers. Even a short period in prison may have damaging, long-term consequences for the children concerned. In many countries, because there are few female prison facilities difficulties arise in maintaining family relationships during custody, in violation of international standards.

[18] It is also worth reproducing another report, though not internationally done, by the Law of Justice Commission of Pakistan, also cited by the learned SFC, which justifies the release of a woman on bail pending trial which states as follows:

> The object of detaining a person accused of an offence is to avoid his absconding from inquiry or trial, or prevailing upon the witnesses by any manner or to disturb the investigation or defeat the trial. However, in the existing social setup of the society it is unusual for a woman to abscond from trial or influence or disturb the pace of investigation or trial; and perhaps this factor prevailed upon the legislature when it provided her the concession of bail in non-bailable offences, under the first proviso to sub-section (1) of Section 497 Cr PC. This concession was allowed more than hundred years before in British India.

[19] Although we do not have the statistics to back us up, but we could confidently state that in all of our years with the Judiciary, a female accused jumping bail is not as common an occurrence as that of a male accused. So, we could fully appreciate where the views expressed in the above-mentioned reports came from and the rationality of the same. Obviously, the discrimination based on gender here is in our view, both reasonable and permissible because it satisfies the two conditions laid down in *Datuk Hj Harun*'s case (*supra*) which is, that it is founded on an intelligible differentia and there is a rational nexus between the object of SOSMA which is clearly enacted for the prevention of acts prejudicial to public order and security of

our nation or any part thereof as rightly stated by Collin Sequerah J (as His Lordship then was) in *Suresh Kumar Velayuthan v. PP* [2020] 4 CLJ 270 and the denial of bail to a person charged for any offence covered by it.

[20] We would further reiterate, as so rightly submitted by learned counsel for the applicant and stated earlier in para. 6 above, based on *Khairuddin*'s case (*supra*), although in our own words, the overarching importance of ensuring that those accused of the crimes under SOSMA would not be given the opportunity to scuttle the investigation and the ensuing trial of the case by absconding or interfering with the witnesses to be called in it. Given that deep concern, the United Nation's empirical study and the Commission of Pakistan's report highlighted earlier provide the rationality of allowing the said gender discrimination.

[21] As for the other leeway given to those below the age of 16 years, the rationality of this exception stares in our faces, for it is plain that there is a special law governing juveniles accused for crime which is the Child Act 2001 and before that, its predecessor, the Juvenile Courts Act 1947. As for a sick and infirm person, that too is beyond reproach because for one, it can safely be assumed that given the medical conditions suffered by such an accused person, there would be a very much lesser risk of perpetuating the danger we mentioned above if freedom before and during trial is granted. Of course, the law does not specify exactly the extent and severity of the illness and infirmity which allows the granting of the said leeway, but again with the object of SOSMA in mind, it cannot be that any illness be a ground to exercise that right to bail for surely the severity of the medical conditions plays a major role in the court's consideration should an application be made on the said grounds. Thus, it is for the court to determine, based on the degree of the illness of the accused person and the infirmity he suffered, backed no less by conclusive medical evidence, that it would be just and fair for the person so charged to be freed on bail whilst awaiting the conclusion and decision of the court on the charge so preferred against him. Otherwise, it would make a mockery of the law should run of the mill illnesses, such as those specified by the applicant herein, be the justification to grant him the freedom he seeks given that the said illnesses are not even life threatening, although this we say without the slightest intention of belittling the said conditions, his fear of contracting COVID-19 infection and his family obligations as stated in para. 3 of this judgment. Further, as highlighted by the learned SFC in his written submission and to which we have no reasons to disagree, the medical report exhibited to the applicant's affidavit in support from Klinik Elizabeth is in respect of his condition on 8 August 2018 and not his current one when the application was made on 3 June 2022. Furthermore, again as highlighted by him, the applicant has been under treatment from the Sungai Buloh Health Clinic with prescribed medications

and the prison authority had given an undertaking to attend to his medical requirements. Thus, if his medical conditions and the situation so warrants, there is no prohibition for the applicant to make a fresh application to be so released.

[22] In respect of the doctrine of proportionality which is the other ground relied on by the applicant, again we are thoroughly convinced that the test prescribed by *Sivarasa*'s case (*supra*) which is reiterated in *Alma Nudo*'s case (*supra*) as highlighted by both learned counsel and the learned SFC, respectively, have indeed been satisfied here given the very object of SOSMA and what it aims to achieve for the security and peace of our nation as per the winding speech of the said Minister when tabling the bill for it which the learned SFC had drawn our attention to as stated in p. 20 of this judgment. The same needs no repetition here, but we would just like to re-emphasise that what we are here concern with is the whole peace and security of our nation, not just a segment of it and that it is an undeniable right, which every citizen in the country expects and must enjoy. There are more than enough worldly historical events which demonstrate the extremely devasting effect on a nation when such a peace and security are destroyed which we need not have to go into. Thus, the harshness of the law on the freedom of a person charged under SOSMA is one, which is militated and justified by the very aim that the said law is promulgated.

[23] As for the fact that this court had on 22 December 2020 granted bail to the applicant *Koh Chin Wah* in Criminal Application No: W-07-94-08-2019, even though he was also charged under s. 26A of the Act, the learned SFC submitted that without the grounds of decision for allowing the said application, the reasons for doing so were merely speculative as held by this court in *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731. Furthermore, he said applying the cardinal principle of statutory interpretation based on the maxim *generalia specialibus non derogant*, which this court did in *Abdullah Atan v. PP & Other Appeals* [2020] 9 CLJ 151, s. 388(1) of the Criminal Procedure Code does not apply given that SOSMA has laid down the specific procedures pertaining to bail. This court in *Abdullah Atan*'s case (*supra*) distinguished the application of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, which should be done in this case as well, said the learned SFC, as there is no displacement of judicial power here, unlike in *Semenyih Jaya*'s case (*supra*) where the determination of the amount of compensation for compulsory land acquisition under s. 400 of the Limited Acquisition Act 1960 rest not which the judge only but also with the two assessors who sat with him. It is to be noted that this court had done the same distinguishment fairly recently in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147. We would pause here to say and without any need for further elaboration that we are definitely on all fours with the learned SFC on the points he had rightly and succinctly canvassed as stated in this paragraph of our judgment.

[24] Settling the above issues would by no means concludes this judgment of ours for there is a remaining one which is outstanding, and that is the applicant's contention that the provision he is charged under, that is ss. 26A and 26D of the Act do not come within the ambit of SOSMA. Why that is so, according to his learned counsel is because although undisputedly ss. 26A and 26D fall under Part IIIA of ATIPSOM and are defined as security offences under the First Schedule of SOSMA but that is not a blanket approval that all offences under the said Schedule be treated or considered as such, following the decision of the High Court in *Mohamad Roslan Marjo v. PP & Other Applications* [2019] 4 CLJ 648; [2019] 10 MLJ 104 which held as follows:

> 16. Notwithstanding the fact that offences under Part IIIA of the ATIPSOM under which s. 26E was enacted, had been listed as security offence under the First Schedule of the SOSMA, it did not provide a blanket provision approval/categorically that all offences thereunder must be treated/considered/defined as security offence under the said Act. It was open to the defence to challenge whether any particular offence under the particular section under the First Schedule qualified to be considered as security offence for the purpose of a trial under SOSMA.

[25] Learned counsel then quoted at length the decision of the COA in *Khairuddin*'s case (*supra*), where the respondents were charged under s. 124L of the Penal Code, which is also incorporated in the First Schedule of SOSMA. However, without a need to go any further, very clearly the facts in *Khairuddin*'s case (*supra*) are distinguishable because as expressly noted by the COA in para. 43 of its judgment, s. 124L of the Penal Code falls under cl. 1(e) of art. 149 of the Federal Constitution which clause is expressly excluded from the preamble of SOSMA, thus warranting the court's finding that there was "ambiguity whether Parliament had intended to categorise and offence under s. 124L of the Penal Code as a security offence." There is no such ambiguity here and in this regard, we are in complete agreement with the learned SFC that the offences under which the applicant are charged relate to the smuggling of migrants which is a threat to public order and his citation of the definition of public order in para. 14 of the Supreme Court of India's decision in *Collector and District Magistrate & Ors v. S Sultan* AIR [2008] SC 2096 is worth reproducing in our judgment. This, we would do together with para. 13 of the said judgment as well as the two charges faced by the applicant, in order to better appreciate the significance of the applicant's alleged crime.

> 13. "Public order" is what the French call '*ordre publique*' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: *Does it lead to disturbance of the current life of the community to amount to disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? (See Kanu Biswas v. State of West Bengal (AIR 1072 SC 1656).*

14. "Public order" is synonymous with public safety and tranquillity: "it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State". Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (see *Dr Ram Manohar Lohia v. State of Bihar and Ors* (1996 (1) SCR 709). (emphasis added)

The charges:

Bahawa kamu bersama-sama di antara 17/05/2020 hingga 19/05/2020 bertempat di alamat No 602, Jalan Air Tawar, Taman Kejiranan Air Panas Setapak di dalam Wilayah Persekutuan Kuala Lumpur telah menjalankan penyeludupan migran bagi mencapai niat bersama. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26A Akta Antipemerdagangan Orang dan Akta Antipenyeludupan Migran 2007 yang dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

Bahawa kamu bersama-sama di antara 17/05/2020 hingga 19/05/2020 bertempat di alamat No 602, Jalan Air Tawar, Taman Kejiranan Air Panas Setapak di dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama, kamu telah mendapat keuntungan daripada penyeludupan migran. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26D Akta Antipemerdagangan Orang dan Akta Antipenyeludupan Migran 2007 yang dibaca bersama-sama Seksyen 34 Kanun Keseksaan. (emphasis added)

[26] Bearing the above quotation in mind, in particular the highlighted portion, which is the question posed in the said cited case and the substance of the two charges faced by the applicant which shows that he was not acting alone when committing the alleged crime, we cannot dispute the learned SFC's cogent stand and conclusion as elucidated in paras. 58 and 59 of his written submission, which are reproduced below:

58. Section 26A to s. 26K falls under Part 11IA of ATIPSOM and create an offence relating to smuggling of migrants. Such acts post a threat public order. Smuggling activities are often syndicated and such activities caused an influx of illegal immigrants in and out of this country. Consequentially, it poses potential health risks or the importation of unknown disease into Malaysia. There would also be risk of introduction of rival trial activities imported from abroad. It follows that smuggling activities have the potential to disrupt even the tempo of the life in the community. Further, an influx of illegal migrants is also a threat to national security. Existing evidence points towards illegal migrants having conspired to provide information to intruders during the invasion in Lahad Datu (see *PP v. Kadir Uyung & Anor & Other Appeals* [2-17] 1 LNS 1403).

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> [59] The applicant, as stated in the charge, was directly involved in actual smuggling of migrants and his culpability remains high. The incoming of illegal migrants has continue to rise, and the correlation between the influx and the act of smuggling is quite significant. Therefore, the respondent humbly submits that section 26A and 26D of ATIPSOM validly constitutes security offences within the meaning of article 149(1) of the Federal Constitution.

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Thus, given the rationale above, and in the context of the applicant's case here, the first part of the question posed in the said para. 13 of *Collector and District Magistrate*'s case (*supra*) as highlighted above is to be answered in the positive and the second part in the negative.

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[27] As for the use of the preamble, again we are in complete agreement with the learned SFC that resort to the preamble of an enacted law is only to be taken as an aid to interpret its provision only when the meaning of the said provision is unclear or doubtful. This has been made more than clear by this court in *Re Application Tan Boon Liat & Ors* [1977] 1 LNS 107; [1977] 2 MLJ 18 and in *Johnson Tan Han Seng v. PP And Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 which quoted with approval the holding of Abdoolcader J in *Re Application of Tan Boon Liat; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126; [1976] 2 MLJ 83 at p. 85 as follows:

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> Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.

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The legislative intent here is glaring given the listing of ss. 26A and 26D of the Act in Part IIIA of the Act and the said part is included in the First Schedule of SOSMA as we had mentioned in the opening sentence of this judgment. It is therefore not open for the court to question the wisdom of Parliament in passing this law given there is no ambiguity in its explicit intention to include the said offences under SOSMA.

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[28] For all the reasons as stated above, we found no merits in the applicant's notice of motion, which therefore warrants its dismissal.

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